Hastings Law Journal

Volume 52 | Issue 3 Article 4

3-2001

What's Wrong with the Uniform Law Process

Gail Hillebrand

What's Wrong with the Uniform Law Process?

by
GAIL HILLEBRAND*

The uniform law process is broken. It's broken first of all, because "pay-to-play" doesn't foster good policy. I don't believe that the National Conference of Commissioners on Uniform State Law ("Conference") or the ALI intentionally set this up so that you have to pay to play—to influence the results—but that, in fact, is what has occurred as a result of having Drafting Committees meet all over the country over a period of anywhere from two to four years, and sometimes much longer. Two to four years is kind of the target number of years to meet, but in the case of Article 2, I've now attended eight years of drafting committee meetings. I'm going to speak to you not just about Article 2, but draw from Article 9 and from the over forty UCC drafting committee meetings that I personally have attended. Those forty-plus meetings barely skim the surface of the other things the Conference had going on affecting consumers during the same time period, 1992-2000, when Article 2 was in play. Most of that time Article 9 was also in play.

There's too much emphasis in the uniform laws process on enactability at the expense of good policy. Of course, in the end, if you're a uniform process, you want to develop uniform law. But how do you do that? The National Conference has sent a signal. It sent it in Article 2 to the sellers—that it can be scared off. The Conference sent sellers a message saying that even when its own process develops a set of rules and its drafters say, "we think this is the right answer," the Conference can be deterred. I'm a registered lobbyist in California. If I sent that signal to my opponents, I would need to get a new profession. I could not be effective if I did that, and unfortunately the Conference did that when it pulled Article 2.

On July 13, 1996, the Executive Committee of the Conference said that the draft, as part of Article 2, should integrate specific consumer protection provisions described in an attached list, and one

* Attorney for Consumers Union, San Francisco, CA.

of those provisions was a protection of the reasonable expectations of the consumer. I suggest to you that what changed between 1996 and 1999, when that draft was pulled, was political pressure. There was no change in whether consumers needed these protections and no change in whether these protections were good policy.

Because this is a legislative—or quasi-legislative—process, it is imperfect. It is imperfect because it involves people. It is imperfect because it involves monetary interests. I want to point out some of the ways in which the process is more imperfect than it has to be. There are areas where, even if the process will never be great, it could be better.

I. Barriers to an Effective Uniform Law Process

Difficult decisions are postponed and re-visited. At our web site,[3] you will see a summary of both the good and bad provisions for consumers in Article 9, including a list of provisions that ought not to be changed as it is enacted in your states. Every Article 9 provision that helps consumers in some small way survived five or six different Drafting Committee votes: several votes on policy, at least two written reports of a consumer task force, and two more votes on policy at the very end of the process.

Those of you who have read new Article 9 know it contains many pro-creditor provisions. Most of those provisions had to survive only one or two votes, while we had to re-fight the same fights again and again to keep the pro-consumer provisions in the draft over a six-to eight-year period.

A. The Conference Fails to Evaluate the Impact of Its Drafts on Unrepresented Parties

The Conference does not evaluate the impact of its drafts on unrepresented parties. In Article 9, the best examples are junior creditors, small debtors, commercial, and involuntary creditors. There were some statements from members of the ALI about how tort creditors would be hurt. But those ALI members were not in the room when the votes were taken. For all that you can make electronic comments or submit letters, in a legislative process, personal credibility is important. You have to be in the room with the person who is holding the pen and the people who have a vote. That means being at the Drafting Committees.

3. www.consumersunion.org/finance/UCC

B. The Conference Does Not Take Responsibility for New Problems that Could Be Created by Its Drafts

The Conference doesn't do a loophole check. In addition to asking, "What's the policy that we think is the best policy or the second best policy that we can get enacted?," the Conference should also ask, "How else might this language be used that we haven't thought of yet? How might this language be abused?" Unfortunately, law provides rules not just for the law-abiding, but also for people who are going to go right up to the edge of what the law permits and peek over the side to see what they can do. The Conference needs to write uniform laws which examine those loopholes, how they will be used, and how they can be closed.

C. Structural Barriers to Effective Uniform Law Drafting

Some of the barriers are structural. I've talked about pay-to-play. Here is another real barrier: it's hard to influence a UCC Article unless you already know a great deal about the UCC. That means that your practice is specialized in that area. If you represent consumers, it means that you need a pro-bono academic expert; some of you in this room could play that role as future projects arise. There is a tremendous learning curve and opportunity cost—not just out-of-pocket travel funds, but also the time to learn these issues sufficiently to become an effective advocate on them. Thus, the process rewards specialists.

Some interested parties are more interested than others. In the last few years, there has been a case involving a deficiency of less than ten thousand dollars that went all the way to the U.S. Supreme Court. It was worth it for the large creditor because law was going to be made that would affect how they did business all over America. If that consumer hadn't had a legal aid lawyer, the case probably never would have gone as far as the Supreme Court. Some parties are more interested than others, can spend more money, can hire more experts, can spend more time. These barriers are the structural barriers. They are very hard to overcome, although I do have a proposal I'll discuss at the end on "pay-to-play" that would make it less of a problem.

D. Voluntary Barriers to Effective Uniform Law Drafting

The next set of barriers are what I think of as the voluntary barriers. The continual re-visiting of issues drives up the cost and extends the length of the process. The very short time between drafts and vote make it hard to prepare and comment effectively. The Conference and the ALI ought to have an agreement and a requirement that all drafts should be in print thirty days before they are discussed. In the California Legislature, a bill has to be in print

thirty days before it can be heard in Policy Committee, even if it is a one-page bill. UCC drafts are often 200 page drafts. Particularly if you're using outside experts or volunteer outside experts, they can't always turn it around for you in three days, or you cannot always fit it in your schedule in just three or four days.

The unwillingness of the Conference leadership to allow UCC text to be finalized in the face of significant opposition is a critical voluntary barrier to effective results. You've heard a little about that already from Dick [Speidel].[1] And the unwillingness to say, "If we create this problem, we have to solve it" is another barrier to good results. Quite commonly in a UCC committee meeting, what you'll hear is, "Well, no one would do that, that would be unconscionable." If you write a clear statutory rule that says, "This and this are allowed" with the only safeguard that a consumer or her advocate may try to persuade a court that the practice is unconscionable even though it is authorized by a specific, recently enacted statute that permits it, this changes the playing field. That shouldn't be happening.

Finally, bright line rules are needed for good policy results. It is true that if you want to "get it right" in every single case, you need a very general rule. But you get only "get it right" as a matter of theory. You get a beautiful and elegant legal structure for cases that courts never see. For the ordinary consumer the elegant legal structure is meaningless, because the amount of money at stake in the individual case will be too small to ever bring smaller dollar cases to a court of appeal and have this beautiful legal construct apply to them.

Sometimes there is too much focus on crafting a complicated, but theoretically perfect, legal rule instead of saying, "We think the result here is right for 90% of the cases. We'll do it plainly, simply, and without creating factual questions in those cases." Instead, uniform law drafters often want to "do it right" for 100% of the cases. This approach leads to rules which multiply factual predicates—highly fact-dependent rules with justice for very few, because you can't enforce those rights without going to court. The litigation must address multiple factual questions to establish the predicates. This is expensive, which means it really doesn't work for most consumers.

The next voluntary barrier to an effective process and good results is the large number of drafts. Here is just one illustration. In preparing for this session, I ordered the fifteen boxes I have in storage for Article 2 and Article 9. Here is just a partial list of the drafts of Article 2 within four years: November 1992, February 1993, September 1993, Summer 1994, December 1994, February 1995,

1. *See* Richard Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L. REV. 607, 610 (2001).

November 1995, January 1996, March 1996, Summer 1996, November 1996. Every one of these drafts probably required a two-week, or shorter, turn around, ten or twenty hours of study to find and evaluate initially all the changes, conferring with outside experts, and preparing written comment letters, and then attending two-and-a-half-day meetings where the issues were discussed. That's a huge investment of time and energy.

II. Differences Between the Uniform Law Process and a Legislative Process

DIFFERENCES	
UNIFORM LAW PROCESS	**LEGISLATIVE PROCESS**
2-9 Years per process	3 Months – 2 Years per process
6-20+ drafting committee meetings (2 ½ day meetings), 2 NCCUSL annual meetings, 2 ALI membership meetings	2 Policy Committees, 2 floor votes, 1 Executive decision (Usually 1 day of hearings)
Locations on both coasts and in-between	1 Location
Little press attention (except regarding UCITA)	Press attention on some measures
Drafting Committees are public, but also meet by phone, 1 closed-door meeting held by Article 2 Drafting Committee	Bills must be scheduled for public hearing
Official analysis comes from drafters	Independent analysis by committee consultant
Usually no empirical data unless presented by an interested party	Independent empirical data sometimes precedes a bill
Time and money are essential	Time and either money or media/public attention are essential

Let's look at the differences between the uniform law process and a legislative process. The uniform law process takes longer. When I got involved in Article 2 and Article 9, I told my office the work would take two to three years, because that is what Bill Burke, the Chairman of the Article 9 Drafting Committee had represented, in good faith, to me. I'm not sure where I got that impression on Article 2. In many states, a legislative process is over, in many states, in three months. In my state, it's two years. But you know what you're getting into on the front end in terms of how much staff time you are investing, or at least how long you will be investing staff time. In a legislative process there are generally five times when you have to go out and round up votes and get things done. In the UCC process, there are many more meetings, six to twenty. There would be six meetings for a two-year process, but in both Article 2 and

Article 9, we had in the range of twenty meetings, plus full drafting committee meetings, plus floor votes. The location of these meetings can be anywhere, and it frequently moves around the U.S.

There are some other differences between the UCC process and the legislative process. It is very hard to get press attention on the UCC process, and I sometimes tell people that it will always be too early. There is no "news hook" until the Conference and the ALI pass something. It will always be too early until it's too late, because by the time there is a "news hook," most decisions have been made. At the time when it becomes news, it's too late to change. It is true that it is very difficult to get media attention in the Legislature on highly technical issues as well, although you can sometimes do it depending on how you can boil the issues down into the most common sense. The one I like from UCITA is you can return the software under the statute, but you're stuck with the hardware. People understand that, and you can do media on that, and that means you can put pressure on public process.

Another difference is how public the process is. Legislative committee hearings, in my state at least, are public and they are scheduled in advance. The UCC committee meetings I have been to by and large have been public, but there was one private session in the Article 2 process where the leadership took the Drafting Committee into a closed room and they came out and said, "We've reversed such and such provision that was important to you and that was the crux of the consumer provisions."

Another very important difference is the lack of independent analysis. This is something where I think the Conference, the ALI, or maybe the academic community could step up to the plate. In the legislative process, you get a committee consultant analysis, which is at least supposed to be independent, and frequently is quite independent. The consultant examines all the arguments and identifies the policy questions to be decided. In the uniform law process, you get an official analysis, but it comes from the same person who held the pen and drafted the act being analyzed. A good Reporter can distance himself or herself from personal views about what should be done and give you an independent analysis. However, many who have been involved, for example, with the UCITA process, feel that some of the statements made about that draft were not entirely reflective of what the black letter actually said. We need additional, independent analysis.

Another difference is that there is usually no empirical data presented in the uniform law process unless an interested party brings it in. There was some very interesting pre-existing empirical data on problems that consumers have had under Article 9 with low-value deficiency sales. It was published in law reviews dating from the

1970's.[2] We had to bring that into the Drafting Committee. It wouldn't have come in any other way. In the Legislature, sometimes you get a GAO-type of study, or in California, a Little Hoover Commission Study or a Legislative Analyst Study; other times the data is provided solely by those affected by a bill.

In the uniform law process, time and money are essential to make a difference, because of the travel costs and the need for depth of expertise. In the legislative process, you need time plus either money or public attention. Public attention to any issue can substitute for lack of funds.

III. Similarities Between the Uniform Law Process and a Legislative Process

There are some similarities between this process and the legislative process. Expertise matters. Political power matters. Committee packing does occur. I've seen that in the California Legislature only once or twice in my fifteen years in lobbying. I saw it twice in Article 2. In addition, the leadership may pressure policy Committees.

It is very difficult, both in the uniform law process and in an ordinary legislative process, to influence the outcome unless you are actually there in person almost every time and you are building personal relationships with the decision makers.

There is this idea of silence as consent. When Articles 3 and 4 came to the California Legislature some time in the very early 1990's, statements were made that this was a better process and a different process from legislation, because this was the experts figuring out what to do in a tough area. If silence is consent, then the uniform law process is not an improvement over the legislative process. This is a place where people could stop and think, "Small business debtors aren't here, but how does this affect them?," or, "Well, consumers are here, maybe small business buyers of goods are not here, how does this affect them?" The failure to ask those questions is a similarity to the legislative process, but also a weakness in the uniform law process.

2. See Philip Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969); Philip Shuchman, *Condition on Value of Repossessed Automobiles*, 21 WM. & MARY L. REV. 15 (1979); Martin B. White, *Consumer Repossessions and Deficiencies: New Perspectives from New Data*, 23 B. C. L. REV. 385 (1982); John C. Firmin & Robert Simpson, Note, *Business as Usual: An Empirical Study of Automobile Deficiency Judgment Suits in the District of Columbia*, 3 CONN. L. REV. 511 (1971); Ellen B. Corenswet, Note, *I Can Get it For You Wholesale: The Lingering Problem of Automobile Deficiency Judgments*, 27 STAN. L. REV. 1081 (1975).

People with votes are not always familiar with the nuances of the issues. For example, the current Article 2 Drafting Committee is examining whether, and how, to exclude software which is transferred with some types of goods, probably an undefined category titled "computers." Well, today if I buy a toaster with a sensor in it that indicates how brown my toast is, it does not matter whether that toaster is operated by software or not, it is a good. The challenge for the Article 2 Drafting Committee is to write a definition that will leave software in goods under Article 2. The members of the Drafting Committee who have to vote on this issue may not all be familiar with the nuances of these highly technologically-dependent issues. That is an issue both in a legislative process and in the uniform law process.

The final similarity between the uniform law drafting process and a legislative process is the imbalance of power between consumers and industry. This is a fact of life in most, if not all, quasi-legislative processes.

IV. Myths of the UCC Drafting Process

I'd like to address several of the myths that I have been hearing over the years about the UCC process. The first myth is that it is objective and neutral. That might be the goal, but it's not being implemented in that way. The second myth is that the process is open to all. Well that's true. It is also true that the San Francisco single family housing market is open to all, but those of you who live here know that does not mean we can all become homeowners.

Consumer groups have not been able to address all of the concurrent uniform law processes. There was a period in the mid-1990's when all of these processes were going on at once: Article 2, Article 9, Consumer Leases, the Uniform Electronic Transactions Act, Article 1, and UCITA. I calculated that at three meetings a year, it would be eighteen meetings a year just to represent the consumer interest before these Drafting Committees. And that's Boston in January, Chicago in March. The hotels where meetings were held were actually better than the ones that we in the non-profit community are accustomed to, and a little pricier than our travel budgets often allow.

Next, there is the myth that "we are all consumers here." In this myth, uniform law drafters assume: "We don't need to look specially at consumer issues, because we buy goods, and we borrow money, and so our experience as lawyers, as academics, as middle- and upper-middle-income consumers reflects the treatment that consumers get in the U.S. marketplace." Well, sometimes yes, and sometimes no. Self-help is not equally available to or effective for all consumers.

Here is an example of how all consumers are not equal under Article 9. In the Article 9 Drafting Committee, there was a lot of talk about sweep accounts. I do not know any consumers who manage their personal bank accounts with sweep accounts. They do not keep enough money to be sweeping it in and out of interest bearing accounts. These two slides compare the sources of credit used by people making these decisions on the Drafting Committee, as compared to some of the other consumers affected by Article 9.

SOURCES OF CREDIT: COMPARED	
CORPORATE LAWYERS	**MODERATE & LOW INCOME FAMILIES**
Banks	Banks
Credit Unions	Credit Unions
Credit Card Companies	Credit Card Companies
Prime Mortgage Loans	Prime & Sub-Prime Mortgage Loans
Personal Banker	—
Margin Loans	—
Personal Line of Credit	—
—	Retail Credit
—	Finance Companies
—	Pawn Shops
—	Payday Lenders

Drafting committee members had access to the usual sources of credit that we all go to, but also to the personal banker, the personal line of credit, and the margin loan. But some of the people who will be affected by Article 9 also use a very different set of creditors, including payday lenders charging 400% interest, finance companies selling over-priced credit insurance, and sub-prime (and in some cases predatory) lenders. The decisions that a drafting committee member makes assuming one kind of commercial party do not always work for another kind of party. In Article 2 there is the same issue of the marketplace offering unequal treatment to different consumers. One other will partially protect consumers if Article 2 doesn't do a good job is paying by credit card. Many consumers may not have to worry about how to enforce their Article 2 perfect tender, recission, and warranty rights. Instead they simply charge back onto their credit card. If you actually examine the charge back law, you are not entitled to charge back unless you have a legal right, so the perfect tender rule remains very important.

But this right is not available to all. Approximately twelve percent of American households can not qualify for credit cards. For those folks at the bottom, warranty, rescission, and perfect tender are incredibly important. Finally, those of us who have sat on the phone for an hour with the bank customer service or technical support of

one kind or another know that if your job is to sell appliances at Sears, you can not be on the phone for an hour during the work day. You will lose your job. So all consumers are not equal in the marketplace.

The last myth, of course, is that balanced products result from the process. There was a balanced product coming out of the Article 2 process, and it was pulled by the Conference leadership. Congress agreed to accept many of the provisions from the Uniform Electronic Transactions Act, but at the same time, Congress added an entire new section, 101(c) on consumer consent, apparently finding UETA lacking in that regard. UCITA was opposed by twenty-four attorneys general as well as libraries, businesses, and consumers, and yet it was approved by the Conference. Article 9 did arrive at a relatively balanced position for consumer debtors: a little better in some places; a little worse in some places; one important new notice. Small business debtors and unsecured creditors, however, are in a worse position under Revised Article 9.

V. Recommendations for Change

I want to talk about how this can be changed. The American Bar Association Task Force on Consumer Involvement, chaired by Mark Budnite at the University of Georgia and William Woodward from Temple, has made a series of recommendations. They made them to the ABA Business Law Section. This very interesting letter discusses how the uniform law process could be a better process. The ABA Task Force makes a number of recommendations. These are the ones I think are the most important. First, travel and preparation funding for consumer representatives. The fact is, I and other consumer advocates have to choose whether to work on the UCC or predatory lending, whether to work on electronic signatures or credit card interest rates. Those are very difficult choices.

The second key recommendation from the ABA Task Force is to select one city for all meetings of a single Drafting Committee. When consumer advocates have proposed this in other forums, Conference leaders have said, "we are a fifty state organization, we have to rotate the opportunity to talk to us." If it was not really a lobbying process, you could show up one time, make your point and go home. But personal credibility makes a difference. Showing up just one time to make a point and then disappearing from the radar screen of the drafting process tends to have zero impact. I attended nearly every Article 2 and Article 9 drafting committee meeting. In Article 9, I saw a number of industry folks from different industries who showed up one time, made their point, and went home. They thought they

had solved the problem but at a later meeting, the Drafting Committee often reversed the change.

You have to be there. If you put a drafting process in one place, we in the non-profit world can adapt in a number of ways. We can find a lower-budget hotel than where the drafters stay. We can find someone who is already in that city who cares or can be persuaded to care about that issue. This might be a current legal services lawyer. It could be an ex-legal services lawyer who is now in academia. Maybe it's one of you. Maybe it's somebody who is now in private practice that is a former legal services lawyers and still cares about low-income consumer issues. Consumer advocates can work creatively to find someone willing to follow a uniform law drafting process as a form of public service. However, I can not recruit that person if part of what they are signing up to do is to fly all over the country for four years. There was a Better Business Bureau person in Dallas who was extremely interested in Article 2 and came to a meeting there. He was quite useful in bringing forth facts and examples, but was not in a position to travel with the Drafting Committee for the next several years. There is a consumer leasing expert in New York who negotiated with the leasing industry on the New York auto leasing statute, but his governmental agency is not going to send him out of state to try to do that for the rest of the country. There were legal aid lawyers in Illinois who were very interested in Article 9. It is not the same as having full representation, but it reduces the hurdle and allows us to try to get that part of the consumer voice to be heard.

The ABA Task Force also recommended that agendas should be published in advance and should be followed. This is also an excellent idea. Next, I will give you some of my recommendations, and then I am going to give you a sales pitch. Those of you who know me know that you will never get out of a room with me without being asked to do something. There needs to be an independent expert process that not only evaluates what the drafts really do, but also puts the policy questions in plain language. If you were to pose on the Consumer Federation of America or one of the National Consumer Law Center's the question "Should Article 2 reverse the *Gateway*[3] decision?" you might get no replies. But now restate the question to read: "Should Article 2 require terms to be posted before the consumer pays and takes possession of the goods? Should there be any exceptions, and, if so, what should those exceptions be?" Those questions might elicit excellent substantive responses, with examples. Part of what needs to occur is that academics and others need to strip away the technical mumbo-jumbo of the UCC, pull out the policy

3. Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (holding that contract terms provided after payment were valid in some circumstances).

kernel, and talk about it in a way that elicits responses from people who are not experts. That has not been done in any of the processes I have been involved in, and I think it would be an extraordinary improvement.

The Conference needs to abandon the model that "silence is consent." My tax dollars can better be spent right here at home in California if the Conference is doing the same thing the Legislature does, which is to listen to whoever comes forward and assume there's no problem with the rest.

The drafting process needs to be streamlined. Both Article 2 and Article 9—six, eight years—Dick Speidel says he's been in for twelve years. I guess I should be lucky I have only been in it for nine. There is too much emphasis on uniformity, and that invites not just mediocrity, but also bullying. In the Legislature, when an opposing interest starts reversing course, we accelerate and try to take a few more pieces out. That essentially is what the sellers did with Article 2 because they could. I don't know what would have happened with the sellers if the Conference had stood its ground and had said:

> This is good policy. Our Drafting Committees voted on it after long, long discussion. Section 2-206, for example, (reasonable expectations of the consumer should be protected) survived four floor votes. There was just one modest change made from the floor. We're going to promulgate the best policy we can write and then we'll see what happens. Or we're going to promulgate it and then we'll have a closed door meeting with industry and try to persuade them that it's not as bad as they think.

The Conference essentially ran away from this opportunity. It sent a message that bullying works. I think that it will be very hard for the Conference to dig out from that message. The Conference needs to show that it is willing to pull the plug if it can't enact good policy. Finally, the uniform law needs to include bright line rules so that it will work for the small dollar transaction.

Now that you have heard what's wrong with the uniform law drafting process, why should you try to get involved in it? Because uniform laws often do get wide enactment, particularly the UCC revision. Because the content of uniform law drafts does influence what happens in State Legislatures. When you come into a Legislature with a 200-page document claimed to be the product of eight years of study, legislators don't want to second-guess that. Often Legislatures are not prepared, in terms of staff resources or legislative timelines to evaluate a 200-page UCC revision in an effective way. If you could influence the substance of what goes into these drafts, you could make a difference in the law that affects yourself, your colleagues, your friends, and low and moderate income Americans everywhere.

Why should you try to influence the uniform law process? I've just told you how hard it is and how expensive it is. The academic voice really counts. You are the peer group for the people who have a vote in this process. Not all of them, but many of them, are academics, like yourselves. They care what you think. Even when a Drafting Committee is intellectually honest, as they usually are, no one can see every nuance of an issue. More brains make a difference in this area. Academics also can be independent of industry, and that is of great value to the process. As academics, you may have the needed expertise already. Ultimately the system can't change without you. So I invite you to get involved in this flawed process and try to make a difference with it.

***